WHEELER — SELECTED ADDRESSES

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"The Origin and Development of the Legal Profession"
"Ideals of the Legal Profession"

THE ORIGIN and DEVELOPMENT

of the

LEGAL PROFESSION

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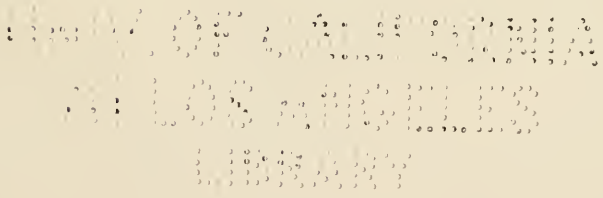

LADIES AND GENTLEMEN:

At the main entrance to the yamun, or official dwelling, of each Chinese magistrate, is a raised platform. Upon this platform are a table and a magistral chair. Around the room are hung whips, bamboo rods, and other instruments of punishment.

The place is always open to whomsoever will enter, and a gong hangs within easy reach. Any Chinese subject who feels himself aggrieved may freely come by day or by night and beat the gong. The magistrate, in obedience to the ancient code, must instantly don his official robes, come forth and occupy the chair of justice, and then and there take action in the case.

This method of invoking justice is the same to-day as in the days of Yao and Shun, and had prevailed in China for more than two thousand years[1] before Christ suffered on Calvary.

When the Master was placed under arrest in the Garden of Gethsemane, you will remember that the hour was about midnight; that he was taken to the palace of Caiaphas, the high-priest and president of the Sanhedrin. There he was brought before a committee of the Sanhedrin—a sort of court of first instance; and this was ere the first crowing of the cock. He was bound over to appear before the full Sanhedrin (the seventy), and daylight was but breaking when this remarkable body—the Supreme Court of the nation—convened.[2]

The constitution of the State of California declares that "The Supreme Court . . . shall always "be open for the transaction of business."

Thus, in these widely separated times and places and among these wholly different peoples, we find an idea common to all—the courts are always open to

[1] Holcombe—"The Real Chinaman."

[2] Watson—"The Life of the Master"; Renan—"Life of Christ"; Books of Matthew, Mark, and John.

those who seek redress. The Chinese courts of four thousand years ago and the Sanhedrin of the Jews doubtless offered facilities for invoking the court on short notice which are not at hand to-day; but the fundamental conception is nevertheless the same—"the eye of Justice never sleeps."

It is not surprising that we find this similarity of idea. The object of the judicial systems of the world, whatever their composition and method, is, of course, the same. Laws defining the higher crimes and felonies are, and always have been, alike the world over. It is in the administration of the law, in the forms of procedure, in the rules of evidence, in the rights guaranteed to the accused, in the nature and extent of the punishment, and in the segregation of the judicial from the legislative and executive branches of government, that the great difference lies.

You will at once follow me when I call your attention to the fact that the presence of advocates in courts of justice has from the earliest times depended upon the grace or caprice of the ruling power.

And the ruling power has not always been gracious in this regard. Lawyers have not always been wanted. In More's "Utopia,"[1] he tells us that in that happy isle "they utterly exclude and banish all attorneys, "proctors, and serjeants at the law, which craftily "handle matters and subtilely dispute of the laws."

We have at least three Utopian attempts of this kind to point to:

Milton says of the Muscovites in his time: "They "have no lawyers, but every man pleads his own "cause, or else by bill or answer in writing delivers "it to the duke; *yet justice, by corruption of inferiors, "is much perverted.*"[2]

Two hundred years later Wallace writes concerning the administration of justice in Russia's lawyerless courts: "Suffice it to say, that in general the

[1] Edition London, 1808, pp. 155-156.

[2] Hortensius, 20.

"chancelleries of the courts were dens of pettifogging "rascality."[1]

In 1864 a new judicial system was introduced in Russia, and since that time it has had a duly authorized bar.

China has been a victim of Utopian justice for the last forty-five hundred years.

"The Chinese," says Holcombe,[2] "have an invin- "cible repugnance to lawyers. Their strongest ob- "jection to all Western modes of judicial procedure "is the existence and employment of lawyers in our "courts. Said a distinguished Chinese statesman to "the author: 'We can trust our own judgment and "'common sense to get at the merits of any case, and "'do substantial justice. We do not need to hire men "'to prove that right is wrong and wrong right.'"

Let us look in upon a Chinese court of justice—that abode of wisdom where they do not need lawyers to tell them that what they call right is, in truth, most dreadful outrage and wrong.

Parties litigant and witnesses approach the court on hands and knees, and must so remain while in the presence of the court. With the witness in this attitude, his testimony is taken. The magistrate himself does the questioning. If the case is a criminal case, he does his utmost to extort a confession from the prisoner. He uses all artifices—flattery, cajolery, threats, cunning and clever cross-examination; and if these do not serve his purpose, he resorts to torture. The unfortunate witnesses are similarly treated. It is not uncommon for a judge to stop in the midst of an examination and order the witness to be beaten across the mouth with a bamboo switch until the blood flows. Witnesses may be made to kneel for hours upon chains, or triced up by the thumbs, or starved into giving so-called "testimony."[3]

[1] Wallace—"Russia" (1877), p. 560.

[2] "The Real Chinaman," pp. 200-201.

[3] Holcombe—"The Real Chinaman," p. 209.

The next illustration we find nearer home.

The Massachusetts Body of Liberties, adopted in 1641, undertook to discourage the building up of a legal profession, by declaring that those who pleaded the cause of others should receive no pay for it.[1] The result was that down to the close of the seventeenth century Massachusetts had no bar. It was during that period that the courts of Massachusetts sank into a condition which would put to shame even a Chinese tribunal. During that period there was cast upon the pages of the judicial history of America the foulest blot they have ever suffered. I refer to the witchcraft trials.

How the blood of an American of to-day boils as he reads the story of those awful murders! The utter disregard of rules of evidence, the outrageous interference of the judges with the functions of the jury, the compelling of the accused to bear witness against themselves—in short, *the absence of the bar*—are painfully apparent at every stage of the proceedings.

When the poor wife of Nathaniel Cary, of Charlestown, was brought before the justices for examination, she was forced to stand with her arms stretched out. "I did request," says her husband in Robert Calef's account,[2] "that I might hold one of her hands, but it "was denied me; then she desired me to wipe the "tears from her eyes, and the sweat from her face, "which I did; then she desired that she might lean "herself on me, saying she should faint. Justice "Hathorne replied, 'she had strength enough to "'torment these persons, and she should have strength "'enough to stand.'"

Giles Cory, charged with witchcraft at Salem in 1692, refused to reply to questions before a jury, and for this offense he was put in a machine of torture and *pressed to death!*

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[1] "Two Centuries' Growth of American Law," p. 14.

[2] More, "Wonders of the Invisible World," (1700).

These tales of judicial horror which I have told you are not stories of wild and barbarous tribes. They are the stories of organized society in widely separated peoples and places. And they are stories of attempts to carry on the administration of human justice without the aid of lawyers.

Well might Justinian exclaim: " Praiseworthy and " necessary for human life is advocacy."[1]

The bar of France, the order of advocates—the *Noblesse de la Robe*—had gone out in a river of loyal blood during the Revolution. We are not surprised that Napoleon in 1804 decreed the re-establishment of the order, " as one of the means most " proper to maintain the probity, delicacy, disinter- " estedness, desire of conciliation, love of truth and " justice, an enlightened zeal for the weak and op- " pressed, which are the essential foundation of their " profession."

Let us now turn our attention to the origin and development of the legal profession.

Its germ will be found in the human sympathies. In the rudimentary courts of ancient days the suitor was required to appear and make his address in person. Next, as a first step toward the profession, we find it permitted that the parent may plead in court in behalf of his child, the husband for the wife, the wife for the husband, or the son or daughter for the aged parent; next, the master is allowed to address the court in behalf of the servant or dependent; next, the sick, the aged, the deaf, the dumb, the blind, are allowed to appoint another to plead for them, though the person so appointed is not a relative; then friend is permitted to appear for friend, but without reward. At length a distinct profession, of men who are paid for their services, is recognized by the laws, and finally, after centuries of growth, the calls of humanity are listened to, and no person is so poor or friend-

[1] Cod. II, Tit. VIII, 23.

less that he may not command a man of education, skilled in the law and in the practice, to advise, defend and plead for him. If the action be a civil action, and the cause be just, the duty is enjoined on the lawyer not to refuse the cause for considerations personal to himself. If a man be charged with crime, and is too poor and friendless to employ a lawyer, the court will give him one, and the lawyer appointed is bound to serve or he will be disbarred. Such, *in syllabus,* are the steps which mark the origin and development of the legal profession.

The position of the bar in England and America to-day did not merely happen to be what it is. It is the result of twenty-five hundred years and more of growth and civilization.

Homer gives us a picture of a trial in ancient Greece. Describing the pictorial emblazonings on the shield which Vulcan fashioned for Achilles, he tells us that:

> "There in the forum swarm a numerous train:
> The subject of debate, a townsman slain.
> One pleads the fine discharged, which one denied,
> And bade the public and the laws decide.
> The witness is produced on either hand;
> For this or that the partial people stand.
> The appointed heralds still the noisy bands,
> And form a ring with scepters in their hands.
> On seats of stone within the sacred place
> The reverend elders nodded o'er the case.
> Alternate each the attesting scepter took,
> And rising solemn each his sentence spoke." [1]

We see no mention of a lawyer in the passage.

In the democracy of Athens the power to judge was not only in the people in theory, but in fact a substantial portion of the populace sat in judgment in the courts of justice. State trials took place before the people at large,[2] while ordinary civil and criminal actions were tried before a court of five hundred

[1] Pope's Iliad, Book XVIII.
[2] Forsyth's Hortensius, 42.

Dicasts—a body of six thousand men annually chosen by lot indiscriminately from all classes. This body was arranged in divisions of five hundred each; but frequently several divisions sat together.[1] It is difficult to comprehend how such a throng, swayed by the orators, and unguarded as to passion and prejudice, could have been looked to for substantial justice.

In the time of Demosthenes, the unfortunate prisoner was brought before the people. The public prosecutor stated the charge and produced the evidence, which had theretofore been taken before a magistrate. He might be followed by any other speakers who wished to aid the prosecution. The prisoner was compelled to plead his own cause, often in chains.[2] No one could speak in the prisoner's behalf, unless the prisoner labored under some disability, and then a member of his family or some friend spoke for him. Lawyers authorized to speak for men in the courts were unknown.[3] The mode of trial at Athens to which I have alluded made it desirable that the address of the litigant or the accused should carry the vast audience of judges who sat in the cause. This gave rise to a class of professional speech-writers—the Rhetoricians—with whose efforts the literature of Greece is so rich. We see in these speech-writers the embryo of the legal adviser, for the rhetorician advised his client in what manner he should address the court.

At length a great and good Athenian, who should be sainted by the bar, named Antiphon, about 440 B. C., set the fashion for charging fees for writing speeches. We may say that with that happy event the germ of the profession is fairly fertilized.

In Rome, under the republic, patrons spoke in court in behalf of their clients, and orators argued lustily, if not always eloquently, against their coun-

[1] Forsyth's Hortensius, 35; 87.

[2] Ib. 36.

[3] Ib. 23-25.

try's unfaithful servants, or in behalf of their fellow citizens whose suffrages and favor they desired in the elections. Fees were not allowed. Presents, even, from client to advocate, were forbidden by law. Boys at seventeen, without legal preparation, were regularly brought to the bar. The speakers in the courts were generally without much education in the law. Advocacy was the road to political popularity and advancement. This was the all-sufficient reward. To accuse an unpopular official in behalf of the state was a coveted privilege. To defend an influential citizen was the next best thing. The lawyer-demagogue was there in his element. But the woes of the humble, the stranger, the poor and oppressed, seem to have been passed unheeded by the unpaid patrician pleaders at the bar of Rome prior to the Christian era.

The great lawyers of that age were the Jurisconsults, who gave advice on points of law, but did not plead in the courts. The Jurisconsults were hard students, worked with their books, and did much to develop a Roman law.

Laws passed two hundred years before Christ prevented the patrons from collecting fees from their clients, rich or poor; but the Jurisconsults, like the Rhetoricians of Athens, were allowed to charge for their services. The result of thus making it possible for a man to devote his life to the law, and at the same time to earn a livelihood, created a distinct profession of the Jurisconsults. The effect upon the jurisprudence of that time was what it has always been where the profession has received recognition; for, as Duruy says of the Jurisconsults, "They took "in hand the cause of the weak, . . . they gave rights "to those who had so long been regarded as incapa- "ble of receiving them, the son, the wife, the mother, "all those disinherited by nature, family, and law, "the spurious, the freed, the slave, and even the in- "sane, whom they sought to protect against himself."[1]

[1] Duruy—"History of Rome," Vol. VI, pt. ii, 353.

The Roman advocate, though unpaid, was not necessarily without a sense of professional responsibility. Though perhaps not learned in the law, he would confer with some jurisconsult and so prepare himself. Some of the advocates, however, were themselves able lawyers. Such a lawyer was Cicero, and you will sympathize with his disgust at the herd of pettifoggers who surrounded him in the forum, when he says: "What can be conceived more disgraceful " than that a man who professes to be able to under- " take the cause of his friends, and assist those who " are in difficulty, and throw the shield of his protec- " tion over the weak, should so blunder in the easiest " and most trifling causes as to appear to some an " object of pity, to others of contempt."[1]

The views of Cicero and his contemporaries regarding the advocate, and the views of the Jurisconsults as to what a legal adviser should be, gave to the profession at the fall of the republic distinct ideals.

Oratory can not thrive where there is no freedom of speech. With the fall of the republic freedom of speech in Rome was gone. The love of power and political advancement, which had brought Rome's greatest men to plead in the courts, could be gratified by political rewards no longer.

The result was that advocates began to work for pecuniary reward where once the only remuneration for which they struggled had been the hope to further their popularity and their political ambitions.

Here was a complete overthrow of ancient professional tradition. The commercializing of the profession has from the reign of Augustus on been a thorn in the flesh of the old school and its followers. To turn a profession which was founded on the human affections and sympathies to commercial use was beneath the dignity of a patrician—below the contempt of a Roman gentleman.

[1] Hortensius, 113.

No wonder that the new bar was jeered at, frowned down upon, criticised and satirized most unmercifully during the first century of the empire. Curiously enough, the legal profession, in the transition from the republic to the empire, had become common and democratic. There was doubtless an extreme commercialism for a time. Such was the natural result of the new condition. Men probably pursued wealth as eagerly as they had been wont to pursue ambition.

It is in this period that Juvenal and Martial make the new bar of the empire their target. One can not but be impressed with the pictures which these writers draw of the bar of that day, and one is forced to admit that they would serve fairly well on occasions at the present day.

Juvenal (about 110 A. D.) says in his Seventh Satire:

> "Say now, what honors advocates attend,
> Whose shelves beneath a load of volumes bend?
> Their voice stentorian in the courts we hear,
> But chiefly when some creditor is near.
> A show of business, eager for display,
> Their lungs, like panting bellows, work away."

But, despite gibes and pasquinades, the new bar had within itself all of the possibilities of growth. It is usual for writers to tell of the sad state into which jurisprudence had fallen during the empire; but it seems to me that never has the bar done more for the benefit of all mankind than it did in the first six centuries after Christ. The contributions to the substantive literature of the law were never so numerous or so important. That literature led the world out of the dark ages. It owes its existence only indirectly to emperors and their edicts. Nor does it come from the bench. The bar is directly responsible for it. Thus, in 529, when the Code of Justinian was given to mankind, that emperor called to the assistance of his ministers of state one Theophilus, who was

a professor of law in Constantinople, and two eminent court pleaders of the day. And when, in the next year, Justinian turned to jurisprudential law and set Trebonius at work upon the Pandects, the latter called to his assistance sixteen persons, of whom four were law professors and eleven were members of the bar.[1]

The lawyers in those days were by no means independent in their selection of clients or of causes. The presiding judge could assign counsel to either side in cases, whether civil or criminal; and if any advocate refused to act for insufficient reasons he was disbarred.

Little has thus far been written of the bar of the dark ages. We know that there were pleaders, and we find them still showing the hereditary weakness of the profession. In Greece and Rome, for example, it had been found necessary in early times to introduce the water-glass in order to shut off eloquence. When the water had run out, the pleader was bound to come to a halt. And similarly in the Germanic tribes, during the dark ages, advocates were allowed to plead, after securing permission of the judge; but they were enjoined to conduct their cases in "plain, unadorned "language, without any tedious circumlocution."[2]

Beaumanoir, speaking of the early French lawyers, says that "it is a great hindrance to judges, who have "to listen to them, to hear long speeches which have "nothing to do with the case."[3]

Some will think that we still find a relic of these dark ages in the rule of our own Supreme Court, which allows to each side but one hour for argument!

The bar emerged from its obscurity with the Crusaders. We hear of it in Jerusalem in 1099, when Godfrey de Boulogne ascended the throne of the Holy City. He established courts and a bar and an admirable ethical code.

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[1] Murhead's Roman Law, 377-379.

[2] Hortensius, 209.

[3] Hortensius, 216.

But it is with the bar of England, France, and America that we are most concerned.

Without going into the formative period of the English bar, the details of which are very obscure, it is sufficient to say that it is in the reign of Edward the First (1272-1307) that the legal profession first assumes something of a definite shape. The serjeants at law, or serjeant counters, made up the counselors of the period. They had undoubtedly appeared as pleaders in court from very ancient times. They are a much older order than the attorneys.

The "Mirror des Justices," written in the reign of Edward—say about 1300—prescribes the code for a pleader of that day:

"First, that he be a person receivable in judgment; that he be "no heretic, excommunicate person, nor criminal, nor a man "of religion, nor a woman, nor a beneficed clerk with cure of "souls, nor under the age of twenty-one years, nor judge in "the same cause, nor attainted of falsity against the right of "his office. Secondly, every pleader is to be charged by oath "that he will not maintain nor defend what is wrong or false "to his knowledge, but will fight for his client to the utmost "of his ability. Thirdly, he is to put in before the court no "false delays (dilatory pleas), nor false evidence, nor move "nor offer any corruptions, deceits, tricks, or false lies, nor "consent to any such; but truly maintain the right of his "clients, so that it fail not through any folly, negligence, or "default in him. Fourthly, in respect to his salary, four things "are to be considered,—the value of the cause; the pains of "the serjeant; the worth of the pleader in point of knowledge, "eloquence and gifts; the usage of the court. And a pleader "is to be suspended if he be attainted of having received fees "from both sides in the same cause; and if he say or do any-"thing in contempt of court."

The ancient law of England required litigants to appear in person, both in civil and criminal cases. This was modified later on in civil cases, so that an attorney in fact might attend in the stead of the party. Then in the old records we see the same name appearing again and again, until it becomes evident that men made a business of so appearing; and thus has come the attorney who appears for litigants generally.

Gradually the attorney, or solicitor, as he is now called, has come to be the man who consults with the client and prepares the case and hands it over to the barrister in the form of a brief. The barrister is seldom permitted to come in contact with the client.

The mayor and aldermen of London in 1263 passed regulations for admission to practice, and ordained that "no counselor [counter] was to be an attorney." This was the beginning of the separation in England of the two branches of the legal profession.

With a profession recognized by the king, a professional code was a natural growth.

In 1275 a statute was enacted providing that "if "any serjeant counter, or any other, do any manner "of deceit in the king's court, or consent unto it in "deceit of the court, or to beguile the court or the "party, . . . he shall be imprisoned for a year and "a day and from thenceforth shall not be heard to "plead in that court for any man."

Thus the respectability of the serjeants and barristers was safeguarded. The crown next turned its attention to the attorneys.

In 1292, King Edward directed his justices to provide for each county a sufficient number of attorneys and apprentices. And these were to be taken from among "the best, the most lawful and most teachable, "so that the king and people might be well served." One hundred and fifty was the number fixed, but it might be increased at the pleasure of the judges. It will thus be noted that both attorneys and counselors in England derive their authority to practice either mediately or immediately from the king.

In 1403 the respectability of the solicitors' branch of the profession was further safeguarded by a statute which provided for an examination of all the then practicing attorneys by the judges, who, in their discretion, were to put their names on the roll. "They "that were good and virtuous and of good fame

"should be received and sworn well and truly to "serve in their offices . . . and the other attorneys "should be put out."

Thus were the morals of both branches of the profession looked after. Since those early times acts of Parliament and rules of court have from time to time been promulgated, looking to the education and training of the bar, as well as to its morals.

The preparation for the law, the honesty of the applicant and the continued worthiness of the lawyer after admission were all carefully guarded by statute and rule. But it pains the student of these English institutions to find so little to suggest that the lawyer was under any positive obligation to lend his aid gratuitously to the oppressed. This I believe to be a matter worthy of more than passing notice, and I shall take it up later on.

Before coming to the American bar, let us consider for a moment the influence of the Christian religion upon our court procedure of to-day, particularly in criminal cases. I dwell upon the criminal procedure, rather than upon civil procedure; for we may know that with life and liberty duly protected the proper safeguards for property are also assured.

While my reading has led me to no writer who has yet remarked it, one can not but be impressed that our criminal procedure and the safeguards thrown about prisoners in our American courts have been influenced greatly by the judicial murder of the Saviour in Jerusalem.

Christ was charged with one offense, and was convicted of a totally different offense of greater degree. To-day, in the courts of America, no man can be convicted of any other crime than that with which he is charged, unless it be a lesser degree of the same crime.

Christ was tried with the utmost haste. With us, even in flagrant cases, self-confessed criminals are not rushed with indecent haste to their trial or punishment.

Christ was not confronted with his witnesses. This right with us can not be denied to the lowest wretch.

Christ was made a witness against himself. With us no prisoner can be compelled to be a witness against himself.

Christ was maltreated, tortured and scourged while in custody. We see sheriffs laying down their lives against mobs in defense of prisoners, often merely that the prisoners shall have a fair trial.

And last but not least, no counsel was assigned to the defense of Christ!

Watson, in his " Life of the Master," points out no less than five flagrant violations of the Jewish law in the proceedings before the Sanhedrin; but there was no lawyer there to cry out against the awful wrong.

Moreover, no one can read the Scriptural account of the vacillating conduct of Pontius Pilate, when called upon to put into effect the infamous sentence demanded by the Sanhedrin, without feeling sure that a single strong voice lifted up in the Saviour's behalf would have held the prætor to his evident merciful inclinations.

Turn now to the effect of that trial upon judicial history. Who has not heard its cruel injustice dwelt upon in the pulpit? It has been a favorite theme among Christian speakers from the days of the Apostles. The orations of the worshipers have rung its horrors down the centuries.

The effect is what we might well expect. When, after three hundred and fifty years, a Christian emperor assumes control of the Roman Empire, we find a bar regularly organized, bound by law to see that both plaintiff and defendant are represented in every cause; and we see the prætor turning to the wretched prisoner and saying, " Si non habebunt advocatum, " ego dabo,"—" If you have no advocate, I will give " you one."[1]

[1] Justianian Code.

The full effect of the conviction of Christ upon criminal procedure did not, however, mature in a day. It required full eighteen hundred years of Christianity to safeguard prisoners even in England and America against all of the injustices which attended the trial of the Messiah.

The Christian emperors of Rome allowed counsel to prisoners, but they compelled the accused to be a witness against himself and put witnesses to the torture to make them confess.

France, following the civil law, permitted the bar of France, the *Noblesse de la Robe,* to speak in behalf of prisoners. She nevertheless compelled prisoners to be witnesses against themselves, and she did not abolish the torture of prisoners and witnesses for the purpose of forcing confessions or testimony until after the French Revolution; and to this day a prisoner in a French court is compelled to testify against himself, and is put through a merciless series of questionings at all stages of the trial. My attention has been called to a celebrated murder trial occurring at Tulle in 1840, in which the prisoner was not only catechised at every stage of the evidence, but hearsay testimony was introduced against her, and the court received evidence of a theft committed by her three years before the murder and in no manner connected with it.

But the slowest of all the Christian countries to yield to the lessons of the trial and conviction at Jerusalem was England. Piteously did prisoners on trial for their lives beg to be confronted by their accusing witnesses. In 1571 the Duke of Norfolk besought the court to compel the Bishop of Ross, whose examination was about to be read against him, to confront him and give evidence. "If the Bishop of Ross, or any "other," he said, "can say otherwise, let them be "brought before me face to face. I have often de-"sired it, but could not obtain it."[1] But the court refused.

[1] I State Trials, 985.

On the trial of Sir Walter Raleigh, in 1603, the evidence of Lord Cobham, taken *ex parte*, was read against him. Raleigh pleaded: "Let Cobham be "here, let him speak it. Call my accuser before my "face and I have done. . . . I beseech you, my lords, "let Cobham be sent for. Charge him upon his soul "and his allegiance to the king. If he affirm it— "I am guilty." [1] But this heart-touching prayer of an innocent man was all in vain.

In the witchcraft trials in England between 1600 and 1700 the veriest hearsay was admitted to prove the prisoner's guilt. Torture was applied to a litigant to make him confess as late as the reign of James the First, and the name of Francis Bacon is connected with the case!

In Scotland torture was in use until the union of the two kingdoms, and was not abolished until the reign of Queen Anne in 1709. Blackstone tells us that a defendant charged with crime was not permitted to produce any evidence whatever in his own behalf in England until the reign of Mary (1516-1558), and it was not until the reign of Anne (1701) that a prisoner's witnesses could be examined on oath.

But the worst remains to be told. In England no prisoner charged with felony, or with an inferior treason, was permitted to have his case argued to the jury on the facts until 1836! Think of it! Shakespeare had been dead two hundred and nineteen years before any English lawyer had ever lifted up his voice in an English court in defense of a prisoner charged with murder! And how piteously they begged that counsel be allowed them! Not only were counsel not allowed to argue the facts to the jury in these criminal cases, but it rested wholly with the court whether a question of law was worthy of sufficient consideration for the prisoner to need legal advice about it.

[1] I State Trials, 15-18.

In the reign of Elizabeth (1571) the Duke of Norfolk, on trial for high treason, made this plea in vain: "I have had but a short warning to provide to answer "so grave a matter. I have not had fourteen hours "in all, both day and night. . . . With reverence and "humble submission I am led to think I may have "counsel. . . . I am hardly handled; I have had "short warning and no books."[1]

Colonel Lilburne, in 1645, after entreating his judges again and again to be allowed counsel, at last cried out, but without avail: "If you will not assign "me counsel to advise and consult with, I am resolved "to go no further, though I die for it; and my inno- "cent blood be upon your hands."[2]

Alice Lisle, before the able but terrible Jeffreys, in 1685, was sent to her death for having harbored in her dwelling a dissenting minister, and this in the absence of any proof that she knew his character. From the scaffold she impressed these burning words upon the black pages of English judicial history: "I "have been told the court ought to be counsel for the "prisoner; instead of which there was evidence given "from thence which, though it were but hearsay, "might possibly affect my jury. My defense was "such as might be expected from a weak woman; but "such as it was, I did not hear it repeated again to "the jury. But I forgive all persons that have done "me wrong, and I desire that God will do likewise."[3]

With no bar at all in Massachusetts, the Salem witchcraft trials were possible. In England, with a well-organized bar—with Coke and Croke and Francis Bacon—the judicial crimes just referred to, and hundreds like them, were possible. But they were possible only because the bar was in reality but

[1] I State Trials, 984.
[2] IV State Trials, 1329.
[3] XI State Trials, 322.

half a bar, for at that date no lawyer could address a jury on the facts in cases of high treason and felony, and no lawyer, save at the pleasure of, perhaps, a tyrant on the bench, could in such cases argue even to the court a proposition in the law of evidence or procedure. While, later on, this restriction was removed in cases of high treason, thereby making possible the eloquence of Erskine, the restriction continued in cases of inferior treason and felonies until 1836, as I have already stated.

Such is a brief sketch of the slow growth of criminal jurisprudence in England.

The apostolic preaching early in the Christian era brought to the notice of men the judicial wrongs committed at Jerusalem, and we not only find many abuses corrected, but we see advocates appointed by the court defending prisoners before the bar of Constantine's tribunals.

France, following with its civil law the rules of procedure of the courts of the Roman Empire, had allowed counsel to prisoners six hundred years before England was moved to do likewise. In England the battle between the Common Law and the Roman Law had given the former a supremacy in matters of procedure.

It may have been that the ritualistic sermonizing of the Church of England was less favorable to a discussion of the trial before the Sanhedrin than was the manner of preaching prevalent in America. But whatever the reason was, the fact remains that the Colonists, long prior to the American Revolution, had broken away from that rule of the English law which prevented counsel from addressing juries on the facts.

The history of the American bar begins with the first half of the eighteenth century.

Prior to 1700 it can hardly be said that there was a bar in the Colonies.

Virginia, like Massachusetts, had prohibited men from pleading causes for pay, and, while this restriction was removed in 1666, most of the lawyers prior to 1700 are said to have been without legal training.[1]

A few lawyers were scattered through the Colonies, but the general situation can be best apprehended when we learn that as late as 1747 there were but fifteen college graduates in the whole of what is now the State of New York.[2]

A change came with the first half of the eighteenth century.

Connecticut passed laws regulating the admission of lawyers as regular officers of the court.

New Jersey laid out a thorough course of preparation for the bar, and established the degree of serjeant at law as the crowning honor for a successful counselor.

Many, particularly from the South, went to England and were educated for the bar at the Inns of Court. The bar of Maryland was particularly strong in men of ability, though it was small in numbers.

There was a strong bar in Boston by the middle of the eighteenth century. John Adams refers to the fact that in 1750 law students were numerous.

The judges in New Jersey and Massachusetts, and perhaps in other colonies, wore official gowns.

Adams, speaking of the year 1761, when he was sworn as a barrister before the Superior Court in Massachusetts, says: "About this time the project "was conceived, I suppose by the Chief Justice, Mr. "Hutchinson, of clothing the judges and lawyers "with robes. Mr. Quincy and I were directed to "prepare our gowns and bands and tie-wigs, and were "admitted barristers, having practiced three years in "the inferior courts, according to one of the new "rules."

Mr. Gridley, a leading Boston barrister, pointed out to Adams, in 1758, the wide range of the Ameri-

[1] "Two Centuries of American Law."

[2] Ib.

can lawyer's duties—a range which has brought to our bar its breadth: "A lawyer," he says, "in this coun-"try must study common law, and civil law, and "natural law, and admiralty law; and must do the "duty of a counselor, a lawyer, an attorney, a solic-"itor, and even of a scrivener, so that the difficulties "of the profession are much greater here than in "England."[1]

During the first fifty years of the eighteenth century, a humanity, born of religion and of its lessons, was nestling in the same cradle with the infant American bar. We find this humanity manifesting itself in such expressions as the following, which I quote from a letter written in October of that year by John Adams to his friend Sewall—afterwards Judge Sewall: "Now, to what higher object, to what "greater character, can any mortal aspire than to be "possessed of all this knowledge, well digested and "ready at command, to assist the feeble and friend-"less, to discountenance the haughty and lawless, to "procure redress of wrongs, the advancement of "right, to assist and maintain liberty and virtue, to "discourage and abolish tyranny and vice?"

Eleven years later these high ideals of John Adams found tangible expression in his own splendid conduct. In 1770, at the risk of ambition, at the risk of losing wholly his great and hard-earned popularity, John Adams, at the command of his chosen profession, braved being branded as a traitor to the cause of American liberty, for which he had stood. This he did by undertaking the defense of Captain Preston, a British officer, and his British soldiers, who were charged with murder for having fired upon a so-called "Boston patriot mob." Let John Adams's words, spoken when told that two lawyers had hesitated about taking the employment, ring forever in every American lawyer's ears!

[1] John Adams's Works, Vol. II, p. 46.

He said: concerning Captain Preston

"Counsel ought to be the last thing for which an accused "person should want in a free country. The bar ought to be "independent and impartial at all times and in every circum- "stance, and persons whose lives are at stake ought to have "the counsel they prefer. . . . If the accused thinks he can- "not have a fair trial without my assistance, without hesita- "tion he shall have it." [1]

Cradled with such lofty conceptions of professional duty, is it a miracle that the American bar leaped forth full-panoplied? Is it to be wondered at that of the fifty-seven signers of the Declaration of Independence thirty were lawyers? Is it a matter of surprise that the Constitution of the United States ever since 1789 has contained the following provision: "In all criminal prosecutions the accused shall enjoy "the right . . . to be informed of the nature and "cause of the accusation; to be confronted with the "witnesses against him; to have compulsory process "for obtaining witnesses in his favor; *and to have the "assistance of counsel for his defense"?* [2]

With the spirit of John Adams and of the young American bar and of Christian liberty thus breathing in the Nation's organism, it is but natural that the American lawyer should have felt the inspiration; that he should be found on the battle-fields of his country and in the Congress of the Nation. We are even prepared to learn that seventeen of the twenty-five Presidents of the United States have been members of the American bar!

Daniel Webster, born in 1782, and admitted to the bar in 1805, had been practicing law under that Constitution and addressing juries in defense of prisoners charged with felonies for more than thirty years before any English lawyer had ever been permitted to point out to an English jury wherein the evidence was wholly and utterly insufficient to convict an accused man of the terrible charge of robbery, incest, rape, or murder!

[1] John Adams's Works, Vol. II, pp. 230-231.

[2] Amendment No. VIII.

The various States of the Union have very generally inserted provisions in their constitutions similar to that just quoted from the Federal Constitution. For example, the organic law of our own State declares that—"In criminal prosecutions in any court what-" ever, the party accused shall have the right . . . to " appear and defend in person and with counsel."

So long as these constitutions endure there will be a legal profession, with its rights and privileges, and its corresponding duties and obligations. The presence of a lawyer at the trial of a prisoner charged with crime no longer depends upon the caprice or favor of the party in power. It rests upon a firmer foundation. It is guaranteed by the organic law of both State and Nation.

It is gratifying that England, to which our jurisprudence owes a great and ever-increasing debt, should have found in the Constitution of the United States so splendid a gift to the Anglo-Saxon race as is this right of the accused to be defended by counsel.

And before I leave this subject let me call attention to the fact that this is not all that the bar of America has given to England. It was in 1787 that the Federal Constitution vested the whole judicial power in one Supreme Court and in such inferior courts as Congress might establish; and that Supreme Court has jurisdiction both at law and in equity. Most of the States in the organization of their courts have been swift to follow this plan, and it was but another step to the reformed procedure which permitted one court in one action to grant all of the relief which in England could be obtained only by an appeal to two distinct courts. In other words, separate courts of law and equity were abolished. New York adopted this reformed procedure in 1847. California has possessed it from 1850. And—*mirabile dictu!*—in 1873 England—conservative England—with one mighty sweep, blots out all of her ancient and time-honored courts and establishes the American judicial system.

Think of the awful slaughter! The Court of Queen's Bench, High Court of Chancery of England, Court of Common Pleas at Westminster, the Courts of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, taken at one fell swoop, and their place supplied with the "Supreme Court of Judicature,"—the very name, as well as the theory, borrowed from the constitution of the State of New York.

I take it that the first American invasion of England was a lawyers' invasion, and that Commerce, steered by Justice, went onward with the flood!

It must be evident to you all that never since history began has so broad, so proud, so responsible a position been given to any bar as that which our governments, State and National, have in their constitutions permanently conferred upon the legal profession of America.

No one admires the sterling integrity, the profound learning, the splendid achievements, and the present exalted position of the bench and bar of England more than I do. And I would not seem ungracious nor ungrateful; for our bar owes so much to that bench and bar that other than courteous and friendly criticism would be most unbecoming, and it is in a spirit of friendly and courteous criticism that I shall speak of the English bar.

England, by her statutes and court rules, has during the last seven centuries provided well for the honesty and education and the respectability of the legal profession. But I am able to find neither statute nor court rule which leads me to think that she has provided equally well—at least by positive regulation—for the humanity of the profession. I cannot find that any English lawyer assumes any obligation to heed the cries of the indigent and oppressed, or that he is bound, even upon the court's direction, to represent, without compensation, a prisoner charged with crime.

Let me cite to you, lawyer-like, two cases, in order to point my meaning. You have already noted that England was slow—very slow—to allow counsel to prisoners charged with high crimes and felonies. Now, with that in mind, please listen to this story—*Reg.* v. *Andrew Fogarty,* tried in 1851. I quote it from Cox's Crown Cases:

"In this case the prisoner was charged with the murder of "his wife, Margaret Fogarty, by administering to her a dose "of arsenic, at Kilkeel, on the 26th of July, 1850.

"Chief Baron Pigott, after conferring with the Crown So- "licitor, addressed Mr. MacMeehan, and requested that he "would undertake the defense of the prisoner, who was unable "to employ attorney or counsel.

"MacMeehan replied that he had no objection personally "to act, but there was a feeling and opinion existing on the "subject among the bar which compelled him to beg that his "lordship would excuse him for declining. After some con- "ference among the members of the bar, Sir Thomas Steples, "Q. C., rose and addressed the court. He said that on the "part of the bar he thought it right to state that there was a "feeling among them, in which he quite concurred, that no "counsel could with propriety undertake the defense of a "prisoner without receiving instructions from an attorney.

"Pigott, C. B., said that with respect to the assignment "of counsel and attorney for a prisoner it was his opinion "that a judge might with propriety call on a barrister to give "his honorary services to a prisoner who was unable to em- "ploy one; but he thought the case different as regarded an "attorney; . . . that he could not compel counsel to act; he "could do no more than appeal to the sense of feeling of the "bar."

I have diligently searched the English reports, and I can find no case which has changed or modified that ruling.

Turn now to the case of *People* v. *Goldenson,* 76 Cal., pages 336-344, decided in 1887. It appears from the record there that when Goldenson was brought to trial in San Francisco, on February 16, 1887, "the "court informed the defendant that he might name "any attorney in the city to defend him, and he would "be sent for and appointed, and that he would be "given a reasonable time to prepare for trial."

Imagine a California lawyer hesitating at such an appointment! He would not only be ostracized and shunned by his fellows, but he would be thrown into jail for contempt and disbarred.

The fact is that we must thank the ancient bar of France—the *Noblesse de la Robe*—for the distinct recognition of those humane ideals which are, perhaps, the proudest obligation that is taken upon himself to-day by every member of the bar of this State.

The bar of France was recognized as a lesser order of nobility from the fourteenth century down to the French Revolution. It flourished side by side with knighthood, and no chevalier of France assumed loftier obligations than did the Nobility of the Robe. The rules of the order, as early as 1360, after laying down divers wholesome regulations, in which are embodied the highest ethical standards of to-day, declared as its noble climax that no member of the bar of France, "under pain of being debarred, should "refuse his services to the indigent and oppressed."

I look in vain for statute, text-book or report to point a similar obligation upon the bar of England.

It was not to be expected that the bar of France, nurtured upon such chivalrous ideals as I have mentioned, would be found wanting in hours of deep national distress. When Louis the Sixteenth went to his trial, did any man—did Louis—doubt the result? It meant death to the king. It meant death to his advocate. But can you not see Malesherbes as he answers the fatal call? "I have twice been sum-"moned," said he, "to the councils of him who was "my master when all the world coveted the honor. "I owe him the same service now, when all men "regard it perilous."

The obligation of the *Noblesse de la Robe* is radiant with the spirit of chivalry, and that same obligation is the birthright and the heritage of every member of the California bar to-day. Coming to us from France, through the Canton of Geneva, it has been

assumed by every man who has been admitted to the bar of California these thirty years and more. Ever since 1872 it has been our law that it is the duty of every attorney and counselor "never to reject, for any "consideration personal to himself, the cause of the "defenseless or the oppressed."

The license to practice law in this state is not a patent of titled nobility, but it is a patent of a still greater moment. It is a patent of lofty, chivalrous ideals; a patent which, if accepted in its spirit and lived up to in its enjoyment, is a patent for a life of purpose, for a life of usefulness, for a life of character, of honor and of good.

There is much to be done in our profession. Many are there who should not be there. But the profession of the law is property, and none can be deprived of it without due process of law.[1] Our courts can not, as did the English courts of old, issue drastic orders that the rolls shall be examined, and the lawyers who are virtuous and of good fame shall be retained and the others shall be put out. It is only upon specific charges, duly proved, that our rolls can be purged; and this method can never reach those whose only offense is that they are incompetent. The remedy is to be found in the exercise of more care in the admission to the bar of new members. Let the profession be built up from without. Let us turn to the universities. Let us exact in every case a thorough preparation for the study of the law and a thorough course in the law. Let us, in other words, obediently follow the course pointed out by Blackstone. England, heedless of his advice, has clung to her ancient method, the Inns of Court; America, where Blackstone's influence has been most strongly felt, made haste to heed his advice.

A lectureship on law was established by Thomas Jefferson at William and Mary College in 1792. It was in attendance upon those lectures that John

[1] Ex Parte Garland, 71 U. S. 333.

Marshall laid the foundation for his judicial career. By a process of development, the plan of Blackstone has gradually been taken up, until now the country is becoming rich in great law schools and universities with law departments.

The next step must be to make the law schools and universities the necessary pathway to the American bar. This will work a hardship in individual cases. Such preparation is not necessary to the bread-and-butter aspect of the profession, and, in occasional instances, the time could be used to the greater advantage of the student if he were permitted to take a short cut to the profession. But the good of the whole profession and the welfare of the whole nation demand the course I suggest.

A nation can advance no better with an ill-equipped bench than it can without any bar at all. The bench must needs be drawn from the ranks of the legal profession. The nature of our institutions is such that it seems unlikely that our judiciary will ever be so well paid by the people that the rule will be for the very ablest men in the profession to go upon the bench.

This places a heavier responsibility upon the bar to see that justice is well administered than rests upon the bar of England, for there each judge of the Supreme Court of Judicature receives some twenty-five thousand dollars per annum, with the result that England's ablest lawyers look forward to these judicial positions. The result is that her judges are men of wide experience, of mature years, and of great learning and ability—in fact, the natural leaders of her bar—and the whole bar looks up to them.

In view of our American system and salaries, we have been peculiarly fortunate, it must be admitted, in getting for our highest tribunals so many able lawyers—and California during the entire period of her statehood has been fairly lucky in this regard; but no well-informed man will deny that such is not always the case, and that there are those on the bench to-day

—particularly in our Superior Courts—who have no business to be there. In these cases it is more often that a legal education and a proper training is absent than that integrity or ability is wanting. An ignorant judge is almost as dangerous to a community as a corrupt judge, and some hold an ignorant judge to be even the more dangerous of the two.

If the people would improve the bench, they have a right to look to the bar for the remedy. If the bar would improve the bench it must first improve itself. And there is no way so certain to bring the bar to a proper standard as to insist that the suggestions of Blackstone regarding legal education shall be followed out and inexorably demanded. You may wait till doomsday for the graduates of law-offices to bring to the profession a higher standard than the prevailing standards of their respective offices. A stream will not rise higher than its source. You can not pluck a pearl of ethics from the shop of a shyster.

It is in the academic atmosphere that the true ethical side of the profession must be absorbed. In the hurry of an active law-office the mechanics of the profession may be acquired, but its ethics must generally be inhaled elsewhere.

And never did the country have a better right to look to bench and bar to meet the demands of the times. The law, always a progressive science, was never stepping with advancing strides more rapidly than now. And it behooves the bar to look well to itself and to the bench.

The great problems of labor and capital are before the courts as never before. Labor is dictating who shall be, and who shall not be, employed and discharged. What is to be the effect of this changed condition upon the law of master and servant? What is to be its effect upon the law of damages against the employer for acts committed through the carelessness or negligence of the employee? The present rules of law on the subject are based upon the theory

that the master is responsible for the conduct of those whom he employs of his own volition. Will the changed conditions affect the rule? This is but one of the innumerable questions which suggest themselves, and some are of far deeper moment than the one just mentioned.

The mammoth aggregations of capital which in these days stagger one's conception of figures give rise to new and most important questions of public policy. The changed demands upon our nation since the Spanish war have given rise, and will continue to give rise, to most important constitutional questions, requiring for their solution not only a high order of intelligence and legal learning, but a high order of statesmanship as well.

History is making very fast. An ever-increasing strain is being put upon our national institutions. The permanency of our liberties rests with our courts. The character of our courts is determined by the character of our bar. It is not too much to insist, for the welfare of the whole people, that a learned profession, charged with such enormous patriotic duties and responsibilities, shall be a learned profession indeed, and that the foundation for its high obligations shall be laid well and deep.

I would not have you think that I decry the bench and bar of to-day. I acknowledge frankly that both bench and bar have a weakness, in that there are too many ill-trained, unread, ignorant men among their numbers. I would see this condition improve, and, through raising the standard, and with the help of the universities, I expect to see it improve. But with all that admitted, I believe that never before in its history has the bar been, as a whole, so well equipped for its duties as it is to-day.

It has been natural for man since the beginning of literature to look upon the distant past as containing everything that is good, while he has decried the decadence of his own day and generation. Despite

its many faults and imperfections, I believe that the bar of America to-day will bear comparison with that of any period in our country's growth. And I believe that the American lawyer, combining as he does the duties of attorney and counselor, of advocate and jurisconsult, practicing in courts which dispense both law and equity, and pleading his causes under the humane guaranties of our State and Federal constitutions, may rightfully claim the leadership of the hosts of the world of law.

You already know why I will not give the supremacy to the English bar. The reason is fundamental. Chivalry—love of man for man, not mere love of man for books—is the basic principle of the profession, for it had its origin in the human sympathies, and the English bar has been too tardy in recognizing this.

Chivalrous as is the bar of France, her criminal procedure is essentially wrong, according to American standards. Her bar, as I see it, tries its criminal cases before a mediæval tribunal, whose procedure is little better than an inquisition.

The German system knows no jury. Three judges sit in the trial of criminals. The bar is admirably trained, so far as reading goes, but the hard-and-fast rules as to its compensation, placing the most able and skillful on the same plane with the less worthy, coupled with the absolute sameness of preparation, seem to me to give but little incentive to those who would, under a different system, be ambitious to advance.

The absence in Germany of the jury system in criminal cases I also consider most detrimental to the interests of substantial justice. I believe that in our system the jury in civil cases might be abolished without detriment to the administration of justice. The system of law and equity is a system of check and balance. It is fitted to meet all emergencies, and the trained mind of a conscientious jurist will, in general,

be more safely trusted with intricate questions of fact than will the mind of the average untrained juryman. But not so in the criminal law. There the commands are positive. The demands of society make it impossible to prescribe by statute a system of equitable correction. Judges on the bench, sworn to uphold the hard-and-fast rules of the criminal statutes, knowing well what the written law prescribes, and just what that language means, are not permitted to read between the lines. Where the law is infringed the statute is the major premise; the facts of the particular case are the minor premise; and the judgment of conviction is the necessary conclusion. The court cannot with conscience inject any equitable ideas of its own into the syllogism.

Yet we know that there are cases which come within the letter of the positive law,—which are within none of the exceptions positively laid down,—and yet we feel that the circumstances are such that the harsh rule of law should not be applied. It is in such cases that juries refuse to be bound by the instructions of the court, and generally work out a rough though substantial justice.

I have somewhere read a story which will illustrate my meaning: A woman on one of the islands subject to Greek rule was convicted of the murder of her husband and stepson. The fact appeared that she had overheard the two plotting to murder her beloved son by her first husband, and in a frenzy at their contemplated crime, she had killed them both. But there was nothing in the Greek law which excused murder under such circumstances, and the woman was condemned to death. She appealed to an appellate tribunal in Athens, and the wise judges of the Athenian court, after hearing the facts, felt compelled to affirm the judgment, but commanded that the woman appear before them at the end of exactly one hundred years, then and there to receive the sentence of death!

Modern criminal law is not flexible enough for our judges to imitate the Greek court of the story. The remedy is with the jury.

I have impressed you with my point if you get from me the idea that the jury system in criminal cases is to the criminal law what equity is to the statute and common law. It serves to check and balance the rules of law in those cases where the universality of those rules would work injustice.

Wrongs have been done by juries in criminal cases, and wrongs will continue to be done by them. But such miscarriages of justice are incidental to all human systems. After all is said, the trial by jury in criminal cases is the most humane, and in the end the most conducive to the peace and order of society of any system thus far conceived.

So, long live the trial by jury in criminal cases! Long live the system which provides that the humblest citizen charged with crime shall have twelve liberty-loving chancellors to correct for him the law, if, by reason of its universality it would, in his case, work an injustice!

I return to the American bar with satisfaction.

Other systems may produce men who, on the average, are more highly specialized and deeply learned in particular branches; but it requires something more than deep learning to make the ideal lawyer. He must have head and training and character and breadth, and he must have the American lawyer's heritage—the heart of John Adams. John Adams's conception of his profession and its duties is to-day the spirit of the American bar!

Despite what disappointed litigants, modern satirists, or carping cynics may say, the history of the bar of America, with few—so few—exceptions, may be written thus: It is a record of unbroken faith; it is a record of enormous confidences reposed and none betrayed; it is a record which tells that men and women have given their property, their reputa-

tions, their homes, their children, and their lives into the keeping of that profession, and have ever found it faithful to the sacred trust; it is a record of inestimable service to State and Nation in time of war and peace; a record of a visible choir, chanting in unison and with compelling fervor the immortal music of Liberty.

IDEALS

of the

LEGAL PROFESSION

Address delivered at the Annual Banquet of the Bar Association of San Francisco at the Hotel St. Francis, May 20, 1909

Mr. Chairman, Invited Guests and Members of the Bar Association:

It is as easy to divorce an oak from its shadow as to divorce from its ideals the legal profession; for the ideals of the legal profession may be said to have been the first in order of time. It was the product of its ideals rather than that the ideals were the product of the profession.

I am going to leave for a moment the realm of the hard and the practical, and I am going into the realm of the ideal.

I read not long since a charming bit of verse written by a full-blooded Indian girl, in which she represents herself as being upon a crystal stream, seeming, in her Indian canoe, like a bubble 'twixt earth and air. About her are the hard outlines of the mountains, and the crags. Mirrored in the stream about her are these bits of nature as well as the trees and ferns and the flowers. She says:

"Mine is the undertone.
The beauty, strength and power of the land
Will never turn or bend at my command;
But all the shade is marred or made,
If I but dip my paddle blade;
And it is mine alone.

"Oh pathless world of seeming!
Oh pathless life of mine whose high ideal
Is more mine own than ever was the real!
To others fame and love's red flame or yellow gold!
I only claim the shadow and the dreaming."

Through the land of the legal profession there flows the river of the ideal. The crags about may be sharp and rough; there may be a dismal swamp here or a malignant pool there; but the river of the ideal flows on. And for about fifteen minutes I want you with me to leave, as it were, "To others fame and love's red flame or yellow gold." Let us get into

our canoe and glide along this river, and claim as our own only the "shadow and the dreaming."

It was at Athens perhaps six hundred years before Christ. In the court of the Dicasts stood an old and tottering man, a woman,—his daughter,—afflicted with lack of satisfactory speech, stuttering and stammering her poor answers, and her child, the old man's grandchild—a half idiot, who, with the other two, was charged with the awful crime of murder. They were about to be condemned, their responses before the Dicasts being so utterly unsatisfactory, when a strong Grecian soldier broke from his place in the audience and, contrary to all precedent, with emotion heaving his breast, and with tears in his eyes and his voice, begged that he might speak for them and tell the Dicasts what the truth was and make their defense known. At that moment there sprang from the human sympathies—leaped into life—the legal profession.

From the tear that dropped in that court at that distant day there has flowed on with increasing force the river of the ideal in our chosen calling. (Applause.) It sprang from the human emotions; it sprang from the human sympathies; and its very origin commanded that those who entered it should have the courage and the capacity to defend the weak against the strong and powerful — to shield the afflicted from their oppressors.

Flowing on through Rome and gathering bit by bit from this rivulet and from that, we see the stream of the ideal taking on the full force of the current that flowed naturally from the system of protection which the patron gave to his client. And it was seen that the services of a profession founded upon friendship—founded upon the lofty ideal of the defense of the weak against the strong, and springing from the human emotions—were something that could not be bought for yellow gold. Such services

were too sacred. The orator could never receive money for his services save by the honorarium—the voluntary expression of gratitude which his client should see fit to make. (Applause.)

And however much the Roman times may have changed, whatever corruption may have existed in Rome, whatever legislative remedies may have been enacted in the ancient days, the fact remained that no Roman advocate was ever able in a suit at law to recover a fee. And be it known that that river flowed on into England and is flowing to this day, and that to-day no member of the bar, entitled either as senior or junior counsel to address an English court, can recover against his client for his fee. He is dependent still upon the honorarium.

That stream, more powerful than the Gulf Stream, notwithstanding the changed conditions, even crossed the Atlantic, and there are American States to-day where the honorarium still is the only compensation of the advocate, and where the lawyer has no legal redress if his client refuses to pay him his fee.

By the "lawyer" I mean the advocate, because a distinction has always been recognized, as in the days of Rome, and as in England to-day, between the man who prepares the case, who studies the law, and the man who addresses the court. It is the speaking from the heart in a court of justice that is too sacred a thing in this ideal world that we are living in for the moment, to be bought for yellow gold.

Before parting from this branch of the discussion and crossing the sea to the ideals of the American Bar —for changed conditions have necessarily molded them—and catching the suggestion from the remarks of the chairman and of Judge Murasky, let me call your attention to the fact that, after all, England's Bar to-day, so far as her counsel are concerned, is controlled wholly by four great Bar Associations—the four Inns of Court. The Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn, are the

four associations that call to the bar and control and discipline the court pleaders of the legal profession. There the young law student, ambitious to go to the bar, goes to Hall during his days at Oxford or Cambridge, or during his reading elsewhere. He attends a certain number of dinners during the term; there he sits in a room which is venerable in years and which is associated with the great names of the English Bar. The coat of arms of this great advocate or of that distinguished jurist is emblazoned on the walls and windows—men who have been called to the bar in that very hall and who have won immortality in the profession. Surrounded by that pride of association, the student sits facing from his seat at table the Benchers—so-called—the governing body of the association, men elevated to that proud station by their attainments—among them distinguished barristers and judges upon the bench. These older members of the bar regard it as a privilege and a duty to attend occasional dinners at their inns and to dine with the oncoming generation of the bar.

It was my great privilege to sit in the Middle Temple as the guest of one of the great Judges of the King's Bench, in the midst of these ideal surroundings, and after the dinner was over, to move with the benchers to the room set apart for them, passing in the hallway, accessible to all, pictures of former students at the temple, men whose names appear in the world of letters and law, names familiar in the text of the great cases that it has been our joy to study and to rely upon. Into this bencher's room we passed where at one hand, among the portraits of other great lawyers and jurists, was that of Lord Eldon, and at the other Gainborough's original portrait of Blackstone. It is in the midst of such surroundings that the young man is called to the English bar—called by his Inn—by his Bar Association, if I may use the term. Not through the courts, but only by the indirect sanction in the courts, does he achieve his license. He is called

to his profession by the Bar Association. Aye, and disciplined by it! Every man who comes to the Bar in that way becomes for life a member of the Inn that calls him and is always subject to its discipline. It may disbar him if it will, subject only to a visitational power of the courts. He feels the responsibility of the honor and integrity of his particular Inn of Court upon him; and a band more jealous of the integrity of its membership cannot be found in the whole world than is to-day to be found in the four Inns of Court. When you ask what gives the English Bar its standing, I answer you, that it is not by the discipline that comes directly from the bench; it is through the discipline that comes from the manly, self-respecting Bar Associations, or Inns of Court, as they are called, which hold a watchful and jealous care over the honor and conduct of their members throughout their professional lives.

But, returning to the stream of the ideal: It flows down through the ages; it flows through the days of chivalry, and gathers in its precepts. Through France and through the Canton of Geneva it receives its portion until it comes to us to-day; and when you and I lifted our hands to heaven, and took our oaths faithfully to discharge our duties as members of the legal profession, we then and there assumed the high obligations of the chivalry of ancient days, molded into concrete modern precept; "never to reject for considerations personal to ourselves the cause of the defenseless or the oppressed." (Applause.)

But you and I took on another obligation. That was an obligation to uphold the Constitution of the United States. There is a deeper meaning in that than in any mere chivalrous idealism—a deeper meaning, a deeper idealism. The American bar found itself in the eighteenth century,—in the early part and before the revolution,—confronted by the necessities that characterize it to-day. We had no division of the profession into solicitors and barristers, proctors and

scriveners, junior and senior counsel. All of the obligations of these and the other branches were rolled into one. And as England had permitted her solicitor to sue for his fee, and since the duties of the solicitor as well as those of the barrister came upon the American lawyer, it was not unnatural, however regrettable it may be from the purely ethical standpoint, that that bit of ancient ethics and idealism, embodied in England and in one or two of the American States in the rule that the advocate could never sue for his fee, lost its place in the jurisprudence, or rules of law, of most of the American States.

But in its place there came something in the nature of an elevated idealism. Twenty years before the American Revolution men of the type of John Adams were at the Bar, and it was then that John Adams, writing to his friend Judge Sewall, said in substance and effect, referring to the vast learning, the vast culture, the vast effort required in the proper preparation of an American lawyer:

> "What could be more admirable—to what higher object could any mortal aspire—than to master all of this great mass of learning in order that its possessor may protect the weak against the strong; that he may curb the arrogant and the tyrannical; that he may assist and maintain liberty and virtue; that he may put down and discourage vice and corruption?"

Those ideals of John Adams had their germ in the American Bar from its very inception. At the time of the revolution the Idealism of the Bar was proverbial. It was not surprising that in the body of lovers of liberty who signed the American Declaration of Independence, out of a total of fifty-seven names, thirty of them were the names of members of the American Bar. (Applause.) It is not surprising that a majority, a vast majority, of the Presidents of the United States—eighteen of the twenty-six—have

been members of the American Bar. It was not to be supposed that a profession grounded upon those ideals would remain stationary. The American lawyer recognized that he was a non-producer; he recognized that he owed some obligation to the country that gave him his place and his position. He became a constructive factor in the community for its betterment. He looked across to England and he saw that no man charged with murder, with rape, with incest, with robbery, could have an advocate sum up in his behalf the evidence in his case. Do you know that Shakespeare had been dead for more than two hundred years before any English advocate before an English jury lifted his voice in defense of a criminal charged with such a crime, upon questions of fact? Why, embodied in the Constitution of the United States, as early as 1789, there was a provision that in all criminal cases of which the Federal Court had jurisdiction the accused was entitled to be represented by counsel. And thus in the organic law of the nation your profession and mine was singled out of all the callings, learned and otherwise, and given a character, a position and a stability as a part of the organic law of the very government itself. (Applause.)

Is it surprising that in the advancement of the administrations of the law, America should have led the way—that Daniel Webster should have been found addressing juries in defense of those accused of crime for more than thirty years before any English advocate had ever so lifted up his voice? This relation of your profession to our free institutions is your heritage. Are you surprised that when de Toqueville in 1831 made his marvelous examination into American institutions he drew this significant conclusion:

> "If I were asked where I placed the American aristocracy I should reply without hesitation that it is not composed of the rich, who are united together by no common tie; but that it occupies the judicial Bench and the Bar." (Applause.)

Aye, the aristocracy of America! the democratic Aristocracy! an aristocracy which every American boy has a right to aspire to! an aristocracy founded upon common sense, upon honesty, upon industry, upon the capacity for infinite toil, upon a character of the highest and best, upon a capacity for the appreciation of American ideals! (Applause.)

That was in 1831. The grave questions confronting this country from that time until the close of the Civil War had their own influence upon the profession; and whether following his ideals and his conscience in maintaining the sovereignty of the States against the Nation, or of the Nation against state sovereignty, the American lawyer was found at his best. From that time on commercial conditions have been changing very rapidly; changes that no Bar has ever before been called upon to cope with, have come in the industrial and commercial conditions of this country. I am not a pessimist. A man has but to look about this room in order to be reassured, if he has any doubt as to the high character and quality of American citizenship represented in the legal profession. I do not believe that there has ever been a time when the American and the American lawyer at heart was more loyal to the Constitution and to the institutions of his country than right to-day. It has been the custom of all times since history began for men to decry their own day and generation and to laud the past. Why, it was almost at the height of the glory of the Elizabethan era that Drummond, the English poet, cried out:

> "What hapless hap had I for to be born
> In this decaying age and dying day,
> When virtue liveth orphanlike forlorn,
> And only those are praised
> Who with the golden sheath can them adorn."

That has been the cry that has echoed down the years, and we hear it still. Yet despite my optimism concerning the individual, it must be admitted

that certain conditions in the hurly-burly of to-day have moved against the Bar; and if de Toqueville came to America to-day and asked where the aristocracy of America is to be found to-day, he might be told that that which is highest and best in the land is not to be found upon the Bench and at the Bar. Such an estimate would be unjust; but we had best meet it face to face and find the remedy if we would come into our own. (Applause.)

The fact is that the enormous aggregations of wealth that have been possible through business combinations, have seduced away from the profession and into the paths of promotion, or into the management and ownership of great corporations, many of the minds that otherwise would naturally have been found at the Bar. It is an unfortunate truth that great aggregations of wealth have offered such inducements that many of the most brilliant minds that otherwise would have been found standing for the highest ethical ideas at the Bar have been seduced away until they have become but the playthings of plutocrats, and have been utilized for purposes of corruption, and have departed from the study of the law and the uplifting of its administration, to the tearing down and degradation and disgrace of both. (Applause.)

It is a solemn fact that the men of the Bar, who should be giving it attention in order that it may hold its place and its own and recover the dignity that it is historically and properly entitled to, are themselves too engrossed in the hurly-burly of modern life and the race for wealth to find one moment for the uplifting of their profession—aye, too engrossed to find one moment to give to the Constitution which they have lifted their hands to heaven and sworn to uphold. The upholding of a constitution consists in something more than refraining from making war upon the nation with bullets and with bayonets. A life at the Bar which is devoid of any active effort for or contri-

bution to the public weal in thought, in act, in precept, or in example, is traitorous! The American lawyer who so lives is false to the oath that he has taken; and yet we see just such lives and just such lawyers on every hand.

But let me come to still another class of lawyers: I do not know why it is, but am I wrong when I say that I am impressed day by day at the cringing, shrinking, mock-modest—contemptible, I was going to say—attitude of members of the Bar? Where is the question of great public interest and concern regarding which the members of the Bar reach their conclusions alone with their consciences and their God, and have the manhood to come straight forth upon the streets and declare them? (Prolonged applause.) How many lawyers do you and you and you know who, in moments of great public concern, have the unflinching courage of their actual convictions? You don't find them. Gentlemen of the Bar, I have taken longer than I intended; but you, sir (addressing the chairman), have referred to the influence of the Bar upon the young men. The influence of the venerable Chief Justice upon one and all of us is felt by every one of us to-night. The influence of such a man as Judge Lindley (applause) and of such a man as Judge Murasky (applause) is felt by each and every one of us to-night. The ideals of the law can not be measured alone in a sense of protection of the weak against the strong; they can not be measured alone as expressions of the human emotions and sympathies; they can not be measured merely by individual rectitude and conduct: but they must be found in the highest and truest American patriotism—in fidelity to the Constitution of the United States; fidelity to the theory of democratic government; fidelity to our institutions which are based upon the idea that the majority shall rule—a patriotism which shall declare an unswerving war—which shall present a solid front—against the corruptionist and the traitor

who would seek to steal that great right guaranteed by the Constitution—to steal it by indirection through the control of political parties or otherwise—to steal the great and fundamental right that the majority shall rule. (Applause.) These ideals mean also an unswerving self-respect in insisting that as a profession it shall have a voice in the selection of the judiciary, a voice which it does not now possess—and I say it with the utmost respect to those judges here present. (Applause.) I mean an *esprit de corps,* a manhood and self-respect and lack of contemptible envy and jealousy sufficient to enable a body of men like you to get together and sift men for qualifications and to place them solely for their learning and integrity upon the Bench. (Applause.) It is your good fortune and not your reward—you have not earned it —that you have such men upon the Bench as are here to-night. (Applause.) There are some not here to-night who have no business to be upon the Bench. You have not in the past had the manhood to keep them away. They represent your profession. They represent the upholding of the Constitution of the United States. Are you going to be false to your oaths and stay dead? Or are you going to wake up and be a profession with all of the ideals that are your heritage? (Applause.) Are you going to continue to stand as a lot of non-assertive men, afraid to declare for what is right or to have opinions and to voice them if you have them? Or are you going, like the men who have spoken before me to-night, to stand as examples of something in your community that will have its reflection in the upholding of the law and the making of the law and the demonstration of the law, and in the making of these young lawyers, of whom Judge Lindley has spoken so feelingly here to-night? Tell them—tell these young men—say to them by the example of your own lives:

"By thine own soul's law learn to live,
And if men thwart thee give no heed,
And if men hate thee have no care.
Sing thou thy song and do thy deed.
Hope thou thy hope and pray thy prayer,
And claim no crown they will not give;
Nor bays they grudge thee for thy hair.
Keep thou thy soul-sworn steadfast oath
And to thy heart be true thy heart.
What thy soul teaches learn to know,
And play out thine appointed part,
And thou shalt reap as thou shall sow;
Nor helped nor hindered in thy growth
To thy full stature thou shalt grow."

(Prolonged applause.)